that the learned judge ought to have restricted his views and interpretation within the scope of the Act without embarking on irrelevant and extraneous matters. Developers of houses are free to sell their houses at any price they may fix but in the present case the price for low cost houses was approved and fixed by the state government at $49,000 at the relevant time. Any demand over and above this sum was contrary to the state government's decision. Any such demand solicited secretly and sought to be paid under the counter without the knowledge of the state government would certainly amount to corruption under the Prevention of Corruption Act 1961.

In his submission learned counsel for the respondent conceded question (a) in the reference and agreed that the sum of $15,000 as payment for under counter money was gratification under the provisions of the Prevention of Corruption Act 1961. However he submitted that the $15,000 gratification was not received corruptly by the respondent particularly as it was meant for her company and not for her personally. We find no merit in this submission as s 3(a)(i) clearly states that any person who corruptly receives any gratification 'for himself or for any other person' shall be guilty under the section. In the case of *Datuk Haji Harun bin Haji Idris* v *PP*[1] the accused was found guilty of corruption under the Prevention of Corruption Act 1961 although the sum of $250,000 which he had received from the Hongkong and Shanghai Banking Corporation was not for his own personal benefit but was for the funds of UMNO.

A person who corruptly receives any gratification need not be a public officer. In the case of *Lim Kheng Kooi & Anor* v *R*[2] the two accused persons who were charged for corruption and abetment of corruption respectively were private individuals and they were found guilty under s 3(b) of the earlier Prevention of Corruption Ordinance 1950. In the circumstances therefore we are of the view that the $15,000 received by the respondent as under counter money was gratification and that it was received by her corruptly under s 3(a)(i) of the Prevention of Corruption Act 1961.

In the light of the evidence in this case and on the view that we have taken of the relevant provisions of the Prevention of Corruption Act 1961 we answer both the questions under reference in the affirmative. The conviction, sentence and the penalty as ordered by the learned sessions judge are restored.

Order accordingly.

Solicitors: *Gunaretnam & Co.*

Reported by *Prof Ahmad Ibrahim*

Anuarul Aini & Anor v Ketua Pengarah Kastam Dan Eksais Diraja Malaysia, Johore Bahru

HIGH COURT (JOHORE BAHRU) — ORIGINATING SUMMONS NO 24-327 OF 1989
JAMES FOONG JC
19 NOVEMBER 1990

Companies and Corporations — Priority — Fixed charge under debenture — Sales tax due to state — Whether sales tax has priority over debenture holder — Sales Tax Act 1972, ss 23 & 70 — Government Proceedings Act 1956, s 10 — Companies Act 1965, ss 191 & 292

The plaintiffs are the receivers appointed by a financial institution under a debenture issued by a company known as Setama Sdn Bhd ('Setama'). The debenture created a first fixed charge over certain assets of Setama. Upon their appointments they gave notice to the Director General of Customs and Excise of Malaysia as required under the Sales Tax Act 1972 and took possession of the fixed assets and sold them for $1.2m. The proceeds of sale were insufficient to repay in full the total amount outstanding under the loan.

The defendants wrote to the plaintiffs stating that there is an outstanding sum of $55,226.52 due from the company under the Sales Tax Act 1972 and that the plaintiffs should pay the sum over to the defendants. The plaintiffs then applied to court seeking a declaration that they are not liable to pay the sum due as sales tax to the defendants in priority to the fixed charge created under the debenture.

Held, dismissing the plaintiffs' application:

(1) The issue is whether the sales tax ranks as a priority payment over the fixed charge of a debenture holder in the event when receivers are appointed. This would depend on the interpretation of s 70 of the Sales Tax Act 1972. Sections 191 and 292 of the Companies Act 1965 concern a floating charge and winding-up proceedings respectively and are not applicable.

(2) Section 70 of the Sales Tax Act 1972 standing on its own does not provide a priority payment for sales tax so incurred. It merely sets out the duties of the receiver. Section 23 of the Sales Tax Act 1972 provides that sales tax should be recovered by way of a civil debt. In such a case s 10 of the Government Proceedings Act 1956 applies and it gives the debt a preferential treatment over all debts or claims of every kind which shall subsequent to such date have been contracted or incurred by or become due from such person to any other person whomsoever except any right vested in any person by virtue of a mortgage or charge of immovable property duly registered in the manner provided by law for the registration of such mortgage or charge.

(3) From the evidence the sales tax in this case was incurred before the appointment of the receivers. As the receivers must have been appointed due to a default, the debt due to the debenture holders can be taken as at the date of the appointment of the receivers. As such the debt was due after the sales tax was incurred.

(4) In any event the fixed charge in this case is not related to immovable property and therefore does not qualify under the exception found in s 10 of the Government Proceedings Act 1956.

[Bahasa Malaysia summary

Plaintif adalah penerima yang dilantik oleh sebuah institusi kewangan di bawah suatu debentur yang dikeluarkan oleh sebuah syarikat dikenali sebagai Setama Sdn Bhd ('Setama'). Debentur mengwujudkan suatu caj tetap yang pertama atas beberapa aset Setama. Sebaik sahaja dilantik, mereka memberi notis kepada Ketua Pengarah Kastam dan Eksais Diraja Malaysia seperti dikehendaki di bawah Akta Cukai Jualan 1972 dan mengambil possessi aset tetap serta menjualnya untuk $1.2m. Hasil jualan adalah tidak mencukupi untuk membayar kembali sepenuh jumlah amaun yang kena dibayar di bawah pinjaman. Defendan menulis kepada plaintif mengatakan bahawa terdapat jumlah yang kena dibayar sebanyak $55,226.52 yang terhutang oleh syarikat di bawah Akta Cukai Jualan 1972 dan bahawa plaintif seharusnya membayar jumlah tersebut kepada defendan. Kemudiannya, plaintif memohon kepada mahkamah untuk suatu deklarasi bahawa mereka tidak bertanggungjawab untuk membayar jumlah yang terhutang sebagai cukai jualan kepada defendan secara keutamaan berbanding dengan caj tetap yang diwujudkan di bawah debentur.

Diputuskan, menolak permohonan plaintif:

(1) Isu adalah sama ada cukai jualan diutamakan berbanding dengan caj tetap pemegang debentur sekiranya penerima dilantik. Ini akan bergantung kepada taksiran s 70 Akta Cukai Jualan 1972. Seksyen-seksyen 191 dan 192 Akta Syarikat 1965 adalah mengenai caj terapung dan prosiding penggulunggan syarikat masing-masing dan tidak terpakai.

(2) Seksyen 70 Akta Cukai Jualan 1972 berdiri atas dirinya sendiri tidak memperuntukkan bayaran keutamaan bagi cukai jualan yang ditanggung. Ianya hanya menyatakan tugas-tugas penerima. Seksyen 23 Akta Jualan 1972 memperuntukkan bahawa cukai jualan seharusnya didapat kembali melalui cara hutang sibil. Dalam kes demikian, s 10 Akta Prosiding Kerajaan 1956 terpakai dan ia memberi hutang itu layanan keutamaan mengatasi semua hutang atau tuntutan daripada setiap jenis yang selepas tarikh tersebut telah dikontrakkan atau ditanggung oleh atau kena dibayar daripada orang tersebut kepada sesiapapun kecuali sebarang hak yang diletakhak dalam sesiapa melalui suatu gadai-janji atau gadaian harta tak alih yang didaftarkan secara teratur mengikut cara yang diperuntukkan oleh undang-undang bagi pendaftaran gadai-janji atau gadaian sedemikian.

(3) Daripada keterangan, cukai jualan dalam kes ini ditanggung sebelum perlantikan penerima. Oleh sebab penerima semestinya dilantik kerana ingkar, hutang yang kena dibayar kepada pemegang debentur boleh diambil sebagai pada tarikh perlantikan penerima. Oleh yang demikian, hutang itu adalah genap masa selepas cukai jualan ditanggung.

(4) Walau bagaimanapun, caj tetap dalam kes ini tidak berkenaan dengan harta tak alih dan oleh itu, tidak layak di bawah kecualian yang didapati dalam s 10 Akta Prosiding Kerajaan 1956.]

[*Editorial Note*: The plaintiffs have appealed to the Supreme Court vide Civil Appeal No 01-80-90.]

Cases referred to

1 *Re Golden Palace Musical Hall Sdn Bhd* [1988] 2 MLJ 634 (folld)
2 *Federal Commissioner of Taxation* v *Official Liquidator of EO Farley Ltd* (1940) 63 CLR 278 (folld)

Legislation referred to

Companies Act 1965 ss 191, 292
Government Proceedings Act 1956 s 10
Sales Tax Act 1972 ss 23, 70

Prasad Abraham for the plaintiffs.
Tuan Idrus Bin Harun (Penasihat Undang-Undang Kastam Dan Eksais DiRaja Malaysia) for the defendants.

Cur Adv Vult

James Foong JC: The plaintiffs in this case are the receivers appointed by a financial institution known as Malaysian Industrial Development Finance Bhd (MIDF) under a debenture issued by a company known as Setama Sdn Bhd ('Setama') in favour of MIDF.

Under the said debenture, a first fixed charge over certain assets (hereinafter referred to as 'the fixed assets') of Setama as set out in the fourth schedule of the debenture was created in favour of MIDF.

When the receivers were appointed on 11 August 1988, they gave notice of their appointments to the Director General of Customs and Excise of Malaysia (the defendants in this case) as required under s 70(1) of the Sales Tax Act 1972. This notice was given for the reason that Setama is a licensed manufacturer as defined under the Sales Tax Act 1972.

In carrying out their duties as receivers, the receivers took possession of the fixed assets of Setama and caused them to be sold for $1.2m.

The loan under the debenture due by Setama to MIDF stood at $1,760,196.89. Therefore even with the recovery from the proceeds of sale it is insufficient to repay in full to MIDF the outstanding loan due by Setama.

The receivers received a letter from the defendants stating that there is an outstanding sum of $55,226.52 due by Setama to the defendants under the Sales Tax Act 1972 and that the receivers should pay over this sum to the defendants. The defendants' claim is based on s 70 of the Sales Tax Act 1972.

The receivers by way of originating summons apply to this court for directions seeking, inter alia, a declaration that the receivers are not liable to pay the said sum of $55,226.52 due as sales tax and excise duties to the defendants in priority to the fixed charge created under the said debenture in favour of MIDF.

The whole issue of this case arises from the wordings of s 70 of the Sales Tax Act 1972.

Section 70 is divided into three subsections and these are reproduced below:

> (1) Where a receiver is appointed of the property of a licensed manufacturer the receiver shall give notice thereof to the Director General within fourteen days thereafter,

and shall before disposing of any of the assets of the licensed manufacturer set aside such sum out of the assets as appears to the Director General to be sufficient to provide for any sales tax that will thereafter become payable in respect of the goods that have been sold or manufactured by the licensed manufacturer before the appointment of the receiver.
(2) A person appointed as receiver who fails to give notice to the Director General within the time specified in sub-section (1) or fails to provide for payment of the sales tax as required by that sub-section shall be personally liable for any sales tax that is or becomes payable as aforesaid.
(3) Where two or more persons are appointed receivers the obligations and liabilities attaching to a receiver under this section shall attach to all such persons jointly and severally, subject to a right of contribution between themselves as in cases of contract.

It is argued by the receivers that s 70(1) of the Sales Tax Act 1972 does not have provisions relating to payment of the sum required to be set aside before disposing of the assets of Setama. Section 70(1) only requires the setting aside of such sum and as no provisions for payment is stated therein, the sales tax levied in this case does not become a priority in payment over and above the debenture holders of a fixed charge.

The defendants on the other hand interpret s 70 of the Sales Tax Act 1972 to provide a priority in payment over the debenture holders of a fixed charge. The defendants' reason is mainly based on the fact that since s 70(1) expressly provides for the setting aside of a sum sufficient for the payment, it should follow that such payment would be classified as preferential payment when it comes to distribution in the case of this nature.

The issue before this court is whether sales tax ranks as a priority payment over the fixed charge of a debenture holder in the event where receivers are appointed. This court was invited to refer to two sections of the Companies Act 1965. The two sections referred to are s 191 and s 292 of the Companies Act 1965.

Section 191 of the Companies Act 1965 provides direction for the distribution to a receiver appointed under a debenture secured by a *floating charge.* Under s 191 the receiver is required to make preferential payment first before the debenture holders receive their dues. Such preferential payments are mainly wages, salary, vacation leave or superannuation or provident fund of employees of a company under receivership. Federal taxes are not listed as a preferential payment under s 191.

Section 292 of the Companies Act 1965 on the other hand provides direction on the distribution to a liquidator where a company is under *winding-up* proceedings.

Under s 292 the liquidator has to pay six categories of preferential payments before secured creditors receive their dues. Similarly the preferential payments are mainly payments due to employees. However, the last category, ranking sixth in line of preferential payments is federal taxes. Therefore federal taxes take priority before secured creditors in the event of a company being wound up.

However, as noted, the position in this case is not similar to both s 191 or s 292 of the Companies Act 1965 since this is not a case of a floating charge or a case involving the winding-up of the company.

Besides s 191 and s 292 of the Companies Act 1965, there are no statutory provisions under the Companies Act 1965 or elsewhere which provide guidelines to a receiver appointed under a fixed charge.

The defendants brought to the attention of this court the decision of Peh Swee Chin J in *Re Golden Palace Musical Hall Sdn Bhd*[1] wherein the circumstances of that case are almost similar to that of this case except in that case the tax involved is service tax. The relevant provisions of Service Tax Act 1975 are identical to those in the Sales Tax Act 1972.

In *Re Golden Palace,*[1] the learned judge decided that the service tax being a federal tax takes priority over the principal and interest of debenture holders. As regards the type of tax, I find that the sales tax in this case falls within the confines of federal tax.

After requesting for further submissions from both counsel, the defendants forwarded to this court fresh grounds, namely, the connection of this case to the Government Proceedings Act 1956.

Section 10 of the Government Proceedings Act 1956 states as follows:

(1) All debts due and claims owing from time to time by any person to the Government, whether upon judgment, bond, or other specialty or upon simple contract or otherwise, shall be entitled from the date of the accrual thereof, respectively, to a preference of payment over all debts or claims of every kind which shall, subsequent to such date, have been contracted or incurred by or become due from such person to any other person whomsoever.
(2) Nothing herein contained shall affect any right vested in any person by virtue of a mortgage or charge of immovable property duly registered in the manner provided by law for the registration of such mortgage or charge.

After careful consideration of the facts and the authorities so submitted, this court is of the view that sales tax has a preference of payment over the debenture holders of the fixed charge in this case.

Section 70 of the Sales Tax Act 1972 standing on its own does not provide a priority payment for sales tax so incurred. Section 70 merely sets out the duties of the receiver which are mainly as follows:

(1) notification of the receiver's appointment to the Director General;

(2) setting aside such sums as appear to be sufficient to the Director General before a sale of the assets of the company under receivership; and
(3) in the event that the aforesaid are not done, then the receiver shall be personally liable to any such tax that is or become payable.

The duties stated above are administrative duties and administrative duties cannot be taken to infer priority payments.

This court adopted the views of Starke J in the case of *Federal Commissioner of Taxation* v *Official Liquidator of EO Farley Ltd*[2] where it states that the setting aside of money sufficient to provide for taxation is only an administrative function. It does not confer priority rights over other claims.

In *Federal Commissioner of Taxation* v *Official Liquidator of EO Farley Ltd*[2] the words used in the Australian statutes are rather similar to s 70 of our Sales Tax Act 1972 and it is clearly decided by the High Court of Australia that setting aside of money sufficient to provide for taxation does not confer priority rights of payment. Such privilege of priority payment must be in clear and unequivocal words from Parliament and not by mere implication.

In fact s 23 of the Sales Tax Act 1972 provides that sales tax should be recovered by way of 'a civil debt'.

Section 23(1) states as follows:

> Without prejudice to any other remedy, any sales tax due and payable and any penalty accruing under this Act, may be recovered by the Minister as 'a civil debt' due to the Government.

As sales tax is a civil debt then s 10 of the Government Proceedings Act 1956 applies. Section 10 gives this debt a preferential treatment for payment over 'all debts or claims of every kind which shall subsequent to such date, have been contracted or incurred by or become due from such person to any other person whomsoever 'except' any right vested in any person by virtue of a mortgage or charge of immovable property duly registered in the manner provided by law for the registration of such mortgage or charge'.

Therefore in this case there are two questions that need to be determined. Firstly, the date of the occurrence of the sales tax as compared with the date when the debt was due to the debenture holders. Secondly, is the debenture holders' right vested in them by virtue of a mortgage or charge of immovable property duly registered in the manner provided by law?

From the affidavits before this court, the sales tax in this case was incurred before the appointment of the receivers. When then were the debts due by Setama to the debenture holders?

Section 5.07 of the debenture states as follows:

> Prepayment
>
> The borrower shall have the right upon payment of all accrued interest up to the date of prepayment of the loan as hereinafter provided and payment of a premium calculated at the percentage specified in the Third Schedule hereto and upon not less than ninety (90) days notice in writing to MIDF to repay in advance of maturity:
>
> (a) all the principal amount of the loan at the time outstanding; or
> (b) any one or more of the instalments of the principal amount of the loan maturing at the respective dates specified in the Second Schedule hereto, provided that on the date of such prepayment there shall not be outstanding any portion or instalment so prepaid.

Deducing from the above, the receivers must have been appointed due to a default of payment by Setama. Such being the case, the debt due to the debenture holders can be taken as the date of appointment of the receivers. Under such circumstances this debt was due after the sales tax was incurred.

As for the second question, this court finds that the fixed charge in this case is not related to 'immovable property'.

Section 6.01(a) of the debenture clearly states as follows:

> ... by way of a first fixed charge all the borrowers' plant, equipment and machinery set out in the Fourth Schedule hereto including all plant, equipment and machinery hereafter acquired together with accessories and parts pertaining thereto.

The assets secured are in fact movable properties. Under such circumstances it does not qualify under the exception of s 10(2) of the Government Proceedings Act 1956.

In view of the aforesaid this court finds that sales tax being a debt owed to the government ranks in priority over the fixed charged of the debenture holders in this case.

This court therefore orders (1) that prayer 1 of the originating summons be dismissed; (2) that sales tax due to the government be paid in priority to the debenture holders of the first fixed charge in this case; and (3) no order as to costs for this application.

Order accordingly.

Solicitors: *Abraham & Partners.*

Reported by *Yap Shao Sin*